SUPREME COURT

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SUBJECT INDEX.

	PAGE
(a) The opinion of the Court of Appeals of Kentucky. *Shipp* v. *Louisville and Jefferson County Air Board*, Ky., 431 S. W. 2d 867 (Appendix 1).....	1
(b) Jurisdictional Statement	1
(c) Questions Involved	2– 3
(d) Basis for Certiorari.....	3– 5
(e) Statement of the Case.....	5– 9
(f) Federal Question Involved.....	9–10
(h) Argument	10–14
(i) Opinions—Appendices 1 and 2.....	15–21
(j) Judgment—Appendix 3	22

TABLE OF CASES.

	PAGE
Downey v. *Urton* (1878), 10 Ky. Op. 143	11
Griggs v. *Allegheny County*, 369 U. S. 84	1, 2, 3, 9, 10–11, 13, 14
Lyle v. *Holman*, Ky., 238 S. W. 2d 157	12
Pickel v. *Cornett*, 285 Ky. 189, 147 S. W. 2d 381	12
Shipp, et ux. v. *Louisville and Jefferson County Air Board*, Ky., 431 S. W. 2d 867	1
U. S. v. *Causby*, 328 U. S. 256	13

STATUTES AND REGULATIONS.

	PAGE
28 U. S. Code § 1257(3)	1
49 U. S. Code § 1301(24)	4, 13
49 U. S. Code § 1304	4, 13
14 Code Federal Regulations § 77.27(b)	5, 12
Kentucky Revised Statutes 183.011(4)	3
Kentucky Revised Statutes 183.011(8)	3
Kentucky Revised Statutes 183.011(9)	3–4
Kentucky Revised Statutes 183.011(15)	4, 12
Kentucky Revised Statutes 183.133(1)	4

MISCELLANEOUS.

	PAGE
39 Corpus Juris Secundum, "Highways," 937, § 20	12–13

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. _____

LOUISVILLE AND JEFFERSON COUNTY AIR BOARD, - - - - - - *Petitioner,*

v.

CURTIS SHIPP and BERNIE SHIPP, - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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1. (a) The opinion of the Court of Appeals of Kentucky to which this petition for certiorari is directed is *Curtis Shipp, et ux.* v. *Louisville and Jefferson County Air Board, et al.*, Ky., 431 S. W. 2d 867. A copy of the opinion is appended hereto. There is no other "official" report of the decision. A copy of the unreported memorandum opinion of the trial court is likewise appended.

(b) (i) The date of the decision sought to be reviewed was June 7, 1968.

(ii) Final judgment was entered, upon a denial of a petition for rehearing, on October 18, 1968.

(iii) Jurisdiction to review by certiorari is conferred by 28 U. S. Code § 1257(3).

The exercise of the Court's discretion in favor of granting the writ is sought under Rule 19(1)(a) of its Revised Rules, in that the decision is not in accord with the decision of this Court in *Griggs* v. *Allegheny County*, 369 U. S. 84. It is a matter of importance to local airport authorities throughout the country.

(c) 1. Do acts which amount to a *"taking"* of property by a local airport authority, when exercised over a period in excess of fifteen years, give rise to a public easement by *prescription,* authorizing the airport authority to remove obstructions from the easement?

2. Is the Air Board entitled to an injunction to protect it in going on to the property of the respondents for the purpose of removing obstructions existing in the public easement?

In the case of *Griggs* v. *Allegheny County,* 369 U. S. 84, this Court held that the local authority was the one who had "taken" an easement over Griggs' nearby property through the operation of its airport, although the local authority operated no airplanes, or otherwise, itself, used Griggs' property. In the case at bar and Louisville and Jefferson County Air Board has done exactly what Allegheny County did in the *Griggs* case and has done it since 1941.

The Court of Appeals of Kentucky dismissed the argument under the *Griggs* case with the statement that "The Air Board has no prescriptive right for the simple reason it has not exercised adverse rights in the space involved for fifteen years; * * *."

It is the contention of the Petitioner that the same acts that constituted a "taking" in the *Griggs* case necessarily gave rise to a prescriptive easement for public use in this case, after the period of fifteen years —the statutory period in Kentucky. It is to this key question that we believe this Court must direct its attention.

The easement is a *public* one. The Air Board is merely the agency for protecting it.

(d) The sole basis for this petition is the failure of the Kentucky court to follow *Griggs* v. *Allegheny County,* 369 U. S. 84.

The following statutes and regulation are involved:

"KRS 183.011. Definitions of aviation terms. * * * (4) 'Air navigation facility' means any facility other than one owned or controlled by the United States, used in, available for use in, or designed for use in, aid of air navigation, including airports, rights, interests or easements in the navigable air space and any structures, mechanisms, lights, beacons, markers, communicating systems, or other instruments or devices used or useful as an aid, or constituting an advantage or convenience, to the safe taking off, navigation and landing of aircraft, or the safe and efficient operation or maintenance of an airport, and any combination of any or all of such facilities.

* * * * * * *

"(8) 'Airport hazard' means any structure, object or natural growth, or use of land, which obstructs the air space required for the flight of aircraft in landing or taking off at any airport or is otherwise hazardous to such landing or taking off.

"(9) 'Approach zone' means that area extending from the end of an airport runway in an inclined plane and increasing in elevation at a given ratio of horizontal to vertical feet, and which area may be more particularly identified and described

by referenec to the Technical Standard Orders of the Federal Aviation Agency.

* * * * * * *

"(15) 'Navigable air space' means air space above the minimum altitudes of flight prescribed by the regulations of the Federal Aviation Agency or department consistent therewith, and includes the air space necessary for normal landing or take off of aircraft."

* * * * * * *

"KRS 183.133(1). The purpose of the board shall be to establish, maintain, operate, and expand necessary, desirable or appropriate airport and air navigation facilities. It shall have the duty and such powers as may be necessary, or desirable to promote and develop aviation, including air transportation, airports, and air navigation facilities."

* * * * * * *

"49 U.S.C. § 1301(24). 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft."

* * * * * * *

"49 U.S.C. § 1304. There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States. Pub.L.85-726, Title I, § 104, Aug. 23, 1958, 72 Stat. 740."

It is stipulated (¶ 7), that the prescribed "clear zone" requires a glide angle of 50 to 1. This is based

on Technical Standard Order Number 18 which is now published as 14 Code of Federal Regulations § 77.27(b). For convenience we quote this portion of the Regulation. In case the Court does not know ILS means "Instrument Landing System."

> "(b) *ILS approach surface.* A surface longitudinally centered on the extended centerline of an ILS runway, beginning at the end of the primary surface and extending outward and upward at a slope of 50 to 1 for a horizontal distance of 10,000 feet and at a slope of 40 to 1 for an additional 40,000 feet. This surface is the width of the primary surface at the beginning and expands uniformly to a width of 16,000 feet as a distance of 50,000 feet from the end of the primary surface."

(e) STATEMENT OF THE CASE.

There is no dispute about the facts material to a decision. They were largely stipulated.

Standiford Field (which is the name of the airport involved) was started in 1939 and actually commenced operations in 1941. An aerial photograph, dated March 1, 1941, filed with the Stipulation, shows the layout of the Field with the then proposed Runway 1-19 drawn in. The area was open farm land. There is also an engineer's drawing filed, giving the exact measurements involved, both flat and in profile.

The Stipulation contains all of the facts that seemed to us to be pertinent:

> "By agreement of the parties hereto, by counsel, the following facts are stipulated.

"1. Standiford Field is operated, pursuant to KRS 183.133, by the Louisville and Jefferson County Air Board.

"2. It was operated by the United States Government from 1942 until 1947, when it was returned to the Air Board following World War II, and is, and at all times herein involved has been the major commercial and industrial airport serving the city of Louisville area.

"3. Eastern Airlines, American Airlines, Transworld Airlines, Delta Airlines, Piedmont Airlines, Ozark Airlines and Lake Central Airlines operate regular commercial schedules into Standiford Field in excess of sixty flights per day.

"4. The Kentucky Air National Guard operates a squadron of planes with headquarters at Standiford Field, and there are numerous other military, government and private landings and take-offs at and from the Field.

"5. Runway 1-19 is the longest and, because of prevailing winds, the most used at the Field. Recent studies indicate that approximately 35% of all landings and 13% of all take-offs are on this runway. During the year 1966, there were 123,062 such operations at the Field.

"6. While the number of operations has grown, the continuous use of the runway has been substantially the same since 1947 and was substantially used by the Military for the period between 1942 and 1947. Jets have been operated since 1946. Four-engine planes operated prior thereto.

"7. The prescribed 'clear zone' for approaches to Runway 19 (TSO-N18) requires a glide angle

of 50 to 1, as shown by the engineer's drawing attached hereto. Regular approaches to the runway are above this level. It is the margin of safety prescribed by the Federal Aviation Administration.

"8. Mr. and Mrs. Curtis Shipp, the defendants, reside and own the property at 4038 Pylon Court, Louisville, Kentucky. They purchased it and have lived there continuously since 1963. The property is a lot 75 feet by 122 feet and is improved with a 1½ story brick veneer three-bedroom house, with full basement. It has a garage and a patio in the back yard. The house is in good condition and well landscaped and is worth approximately $19,500.00.

"9. In the rear of the back yard are two pin-oak trees standing 50.9 feet and 39.7 feet high. The house is 22½ feet high from the ground and the fireplace chimney is 23½ feet from the ground. The elevation of the ground on the defendants' property does not vary more than one foot. The trees shade the outside patio, the rear yard, the back of the house, part of the roof and make the premises cooler, more beautiful and in general a more pleasant, desirable and valuable place to live.

"10. The trees are situated approximately 1400 feet North of the end of Runway 19 and approximately 600 feet West of the center line of said Runway, if extended.

"11. In late 1966 or early 1967, VASI equipment costing approximately $50,000 was installed at the airport for the purpose of controlling the altitude of approaching planes. The Federal Aviation Agency will not permit the use of said equipment unless the trees are cut down into the

clear zone, which would mean that approximately 25 feet or one-half of the taller tree would have to be removed and fifteen feet of the shorter tree would have to be removed. In all probability, this would kill both of the trees. Pin-oaks grow at the rate of one and one-half feet per year in Kentucky.

"12. Although the number of flights and noise level near and over the defendants' property have gradually increased, the defendants have never complained to the Air Board nor has there been any damage to their property as a result of said flights.

"13. Filed herewith is an aerial picture dated March 1, 1941, which shows the property of the airport with Runway 19 drawn on it. There are trees shown in said picture which are in the proximate location, but may or may not be the same trees.

"14. It is the contention of the Air Board:

That it acquired, on behalf of the public, a prescriptive right to a clear zone approach to Runway 19 at an angle or glide path of 50 to 1 in 1956 (fifteen years after the Field went into operation), and that it has the right and duty to remove obstructions from said clear zone thereafter occurring.

"15. It is the contention of the defendants:

That the Air Board acquired no property rights to any particular way of passage for aircraft as they have always had the right to use the navigable air space above defendants' land so long as the flights do not materially and substantially interfere with the use and enjoyment of defend-

ants' property, but that these rights of the Air Board cannot be enlarged upon so as to enter defendants' property and remove the trees in question. If it is deemed necessary to remove the trees in question, condemnation is the appropriate action to be taken."

(f) This action was originally filed by the Kentucky Airport Zoning Commission (created in 1960), to require the defendants to remove their trees, at their own expense, under the provisions of the Airport Zoning Law. The trial court held that the remedy of the Commission was to condemn the trees. Thereupon the Louisville and Jefferson County Air Board intervened in the action and asserted its *title by prescription,* on behalf of the public, to the unobstructed use of the lower stratum of air space over the defendants' property for the passage of aircraft, and requested the right at its expense to go on to the property of the defendants and "top" the two trees that had grown up into the clear zone.

The trial court sustained the right of the Air Board and dismissed the complaint of the Airport Zoning Commission. The posture of the case on appeal, therefore, was between the property owners and the Louisville and Jefferson County Air Board alone.

The whole theory of the case for the Air Board, of course, is bottomed upon the decision of this Court in *Griggs* v. *Allegheny County,* 369 U. S. 84. Unless the Air Board, on behalf of the public, has acquired an easement to maintain the open character of the area as it has existed for more than fifteen years, the only

remedy open is to condemn an easement and a right to enter on the property of the defendants to keep the approach zone clear.

This question was raised by the intervening petition, was sustained by the trial court and simply brushed aside by the Court of Appeals of Kentucky with the observation that the Air Board "has not exercised adverse rights in the space involved for fifteen years." The petition for rehearing, filed in the Court of Appeals, is a part of the record here and shows the insistence made below upon the applicability of the *Griggs* case, even though it was ignored by the Court of Appeals in its opinion. We submit that the *Griggs* case is controlling in this case.

(h) **ARGUMENT.**

As stated by the Court itself in *Griggs* v. *Allegheny County,* 369 U. S. 84:

> "The question is whether the respondent has taken an air easement over petitioners' property for which it must pay just compensation as required by the Fourteenth Amendment."

There is no difference between what was done by Allegeheny County in the *Griggs* case and what was done by the Louisville and Jefferson County Air Board in the present case. The air lines used both airports as lessees of the sponsor. Military and private planes are in almost constant operation. The *Griggs* opinion states:

> "It is argued that though there was a 'taking' someone other than respondent was the taker—the air lines or the C.A.A., acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner and lessor of the airport, was in these circumstances the one who *took* the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed * * *. We see no difference between its responsibility for the air easements necessary for the operation of the airport and its responsibility for the land on which the runways were built."

If the Air Board has the same responsibility for approach zones as it has for runways, and under *Griggs* this is so, it likewise acquires rights like any other landowner. The acts which constitute a "taking" are bound to give rise to a legal right after fifteen years. Indeed, prescriptive rights arise even when they are not "adverse." The rule is thus stated by Judge Elliott (who was later assassinated, but not for his decision in this case), *Downey* v. *Urton* (1878), 10 Ky. Op. 143:

> "* * * if there is a passway over a man's land which his neighbor has used, not by his permission merely but under a claim of right for more than twenty years, then such neighbor has a right to continue to use the passway, and it becomes unlawful to obstruct it or hinder his use of it."

More recent cases to the same effect are *Pickel* v. *Cornett,* 285 Ky. 189, 147 S. W. 2d 381, 382, and *Lyle* v. *Holman,* Ky., 238 S. W. 2d 157. The prescriptive right arises from the *use*—at common law, the presumption of a lost grant.

The limits of the prescriptive easement are not simply the traveled portion of the air, but include the area needed for the safe operation of the approach zone. For example, the SS "Queen Mary" with a beam of 119 feet could not safely dock in a berth 120 feet wide, if any tide was running. By the same token, a "Boeing 707," with a wing spread of 154 feet, or the new "Lockheed C5A," with a wing spread of 222.7 feet, could not safely land, with only a foot or two to spare, through an avenue of trees.

The extent of the easement required is obviously the limits fixed by the Technical Standard Orders of the Federal Aviation Agency, which originally was "TSON18" and is now Title 14 of the Code of Federal Regulations, Chapter 1, § 77.27, Subsection (b). It is stipulated (¶ 7) that the prescribed clear zone requires a glide angle of 50 to 1 as shown on the engineer's drawing. It is therefore unnecessary for the Court to examine the somewhat recondite regulation.

As is shown by KRS 183.011(15), quoted above, the "navigable air space" includes the air space necessary for normal landing or take-off of aircraft. The general rule, as stated in 39 C.J.S. "Highways," 937 § 20, is:

> "User sufficient to create a highway by prescription establishes the public character of the

> road or highway. The width of a highway so created is generally coextensive with the extent of actual user for road purposes, and comprehends not only the traveled track, but also such other land as is *actually, reasonably, and necessarily used* for highway purposes incidental to use of the track."

In the text it states that:

> "The easement is not, however, necessarily limited to the beaten path * * * but carries with it * * * such width as is *reasonably necessary* for the *safety* and *convenience* of the traveling public * * *."

We have found no Kentucky cases on the exact point but it is submitted that the rule as stated in Corpus Juris makes sense and must be the law.

So far as Federal law is concerned, 49 U.S.C. § 1301(24) (following the decision in *U. S.* v. *Causby,* 328 U. S. 256), defines "navigable airspace" to "include airspace needed to insure safety in take-off and landing of aircraft" and by 49 U.S.C. § 1304 a public right of freedom of transit through the navigable airspace is recognized.

These laws were all in force at the time when Mr. and Mrs. Shipp bought their property in 1963.

With all due respect to the Court of Appeals of Kentucky, we submit that there is nothing to condemn. The easement claimed for the public by the Air Board already exists. The only problem is whether or not the Air Board can keep the easement free of obstructions.

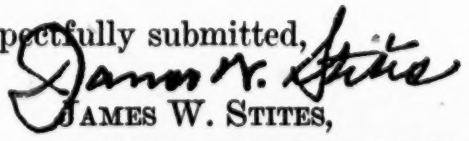
Under the decision of this Court in the *Griggs* case, it is submitted that the Air Board "took" the easement

over the property in question when planes began to fly through the lower stratum of air in their approach to Runway 19. This right became absolute after fifteen years of operation—and existed *before respondents purchased their property* in 1963.

It is respectfully suggested that this is a question which is common to all airports throughout the country and of far more importance than the immediate case. The *Griggs* case can not be ignored. We ask that this Court so advise the Court of Appeals of Kentucky.

We have appended (1) the opinion of the Court of Appeals, (2) the opinion of the Franklin Circuit Court, and (3) the mandate of the Court of Appeals of Kentucky, which is the only "judgment" of that court. Notice has been given the clerk that parties other than petitioner and Mr. and Mrs. Shipp have no interest in the outcome of this petition, pursuant to Rule 21(6).

Respectfully submitted,



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